BRIEF IN SUPPORT OF PETITION.

A.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals is reported in 141 F. 2d 144 and in the transcript of the record at pp. 66-71.

B.

Specification of Errors.

The errors relied on are:

1. The Circuit Court of Appeals erred in affirming the judgment of the District Court.

2. The Circuit Court of Appeals erred in holding that "two independent policies of insurance" were issued by the petitioner to the insured.

3. The Circuit Court of Appeals erred in holding that the provision granting additional death benefits was accident insurance and hence subject to the provisions of the Illinois statute relating to accident and casualty insurance.

4. The Circuit Court of Appeals erred in failing to give effect to the Illinois statute which provides that policies of life insurance which contain provisions against death by accident, shall nevertheless be deemed to be policies of life insurance.

C.

Statutes Referred To.

The policy of insurance was issued to the insured in the State of Illinois as of April 5, 1935, and is therefore subject to the pertinent provisions of the Illinois statutes then in force rather than the Insurance Code which was thereafter adopted.

Cahill Ill. R. S. 1933, Ch. 73, Par. 341, being Section 18 of an Act to organize and regulate the business of life insurance, approved March 26, 1869, in force July 1, 1869, Laws 1869, p. 229, said Section 18 being added by amendment in 1917, Laws 1917 p. 546, approved June 11, 1927, in force July 1, 1917, Laws 1917, p. 577:

> "* * * and no insurance company organized under the laws of any other state or country shall, in addition to the business of life insurance, transact the business of accident and health insurance, or either of them, in this State, unless so authorized by its charter or by the laws under which it is organized and upon compliance with the laws of this State relating to such insurance, but policies of life or endowment insurance or annuity policies which contain provisions operating, in the event that the insured or annuitant shall become totally and permanently disabled from any cause, to safeguard the insurance against lapse or to grant a special surrender value or an annuity payable for a limited period or during the life of the insured, or which contain provisions granting insurance against death by accident, shall nevertheless be deemed policies of life or endowment insurance or annuity policies within the intent of this section."

Cahill Ill. R. S. 1933, Ch. 73, Par. 468, being Section 20 of an Act concerning and to regulate policies issued by companies, corporations, associations, societies or other insurers, doing accident and casualty insurance business,

and to repeal Acts or parts of Acts in conflict with this Act, approved June 29, 1915, in force January 1, 1916, Laws 1915, p. 472:

> "No such policy shall be so issued or delivered * * * (6) unless the exceptions of the policy be pointed (sic) with the same prominence as the benefits to which they apply: * * *"

See also Section 12 of the Act last above cited, Cahill R. S. 1933, Ch. 73, Par. 478:

> "Nothing in this Act shall apply to or in any way affect contracts supplemental to contracts of life or endowment insurance where such supplemental contracts contain no provisions except such as operate to safeguard such insurance against lapse or to provide a special surrender value therefor in the event that the insured shall be totally and permanently disabled by reason of accidental bodily injury or by sickness * * *"

I.

Where a Policy of Life Insurance Provides for an Additional Benefit to Be Payable if Loss of Life Results From Accident, Such Policy Remains a Policy of Life Insurance and Does Not Become Also a Policy of Accident Insurance.

Pacific Mutual Life Insurance Co. v. *Parker*, 71 F. 2d 872 (1934, C. C. A. 4), where the court said at page 875:

> "And it is settled by the overwhelming weight of authority, that a policy providing for payment in case of accidental death is, to the extent of such provision, to be deemed a policy of life insurance within the meaning of a statute having relation to life insurance. *Logan* v. *Fidelity & Casualty Co. of New York*, 146 Mo. 114, 47 S. W. 948, 950; *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489, 27 S. Ct. 578, L. Ed. 895; *New York Life Ins. Co.* v. *Rositzky* (C. C. A. 8th), 45 F. 2d 758;

Continental Casualty Co. v. *Agee* (C. C. A. 8th), 3 F. 2d 978; *Aetna Life Ins. Co.* v. *Wertheimer* (C. C. A. 10th) 64 F. 2d 438; *Lamport* v. *General Accident Fire & Life Assur. Corp.*, 272 Mo. 19, 197 S. W. 95; *Johnson* v. *Fidelity & Casualty Co.*, 184 Mich. 406, 151 N. W. 593, L. R. A. 1916A, 475; *Zimmer* v. *Central Accident Ins. Co.*, 207 Pa. 472, 56 A. 1003; *Officer* v. *London Guarantee & Accident Co.*, 74 Colo. 217, 220 P. 499; *Carter* v. *Standard Accident Ins. Co.*, 65 Utah 465, 238 P. 259, 41 A. L. R. 1495."

Federal Life Ins. Co. v. *Zebee*, 82 F. 2d 961 (1936, C. C. A. 7), where the court stated on page 963:

"It is contended, however, by appellant that the limitations in the policy pursuant to the requirements of the statute, apply only to life insurance and do not apply to the 'double indemnity rider.' In other words, it is contended that the double indemnity feature for accidental death is not life insurance within the meaning of the statute. We think there is no merit in this contention. The rider is 'attached to and made a part of' the life insurance policy and because it contains no disability benefits, but insures only against accidental *death*, it is a policy of life insurance, hence governed by the provisions of the Indiana statute as to incontestability and misrepresentation. See *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895; *New York Life Insurance Co.* v. *Rositzky* (C. C. A.) 45 F. 2d 758; *Aetna Life Insurance Co.* v. *Wertheimer* (C. C. A.) 64 F. 2d 438; *Pacific Mutual Life Insurance Co.* v. *Parker* (C. C. A.), 71 F. 2d 872."

New York Life Ins. Co. v. *Rositzky*, 45 F. 2d 752 (1931, C. C. A. 8), where the court stated on page 765:

"There was one policy on life, no matter how death was caused, but, if caused by accident, there was to be a larger indemnity for the loss of life. It was still life insurance and covered by the single consideration. No features of accident insurance were in the policy outside of this one provision."

Provident Life and Accident Insurance Co. v. *Rimmer*, 12 S. W. 2d 365 (Tenn. 1928); *Bowles* v. *Mutual Benefit Health & Accident Assn.*, 99 F. 2d 44 (1938, C. C. A. 4); *Orr* v. *Prudential Ins. Co.*, 274 Mass. 212, 174 N. E. 204, 72 A. L. R. 872 (1931).

II.

Life Insurance Policies Containing Provisions Granting Insurance Against Death by Accident Are, by Virtue of Statute in Illinois, Deemed to Be Policies of Life Insurance and Consequently Are Not Subject to the Provisions of the Illinois Statute Relating to Accident and Casualty Insurance.

Ill. R. S. 1935 (Ill. Bar Assn. Ed.) Ch. 73, Par. 341 (See *ante*, p. 6).

Julius v. *Metropolitan Life Insurance Co.*, 299 Ill. 343, 132 N. E. 435, 17 A. L. R. 956, where the court said on page 348:

> "In common parlance we do not refer to accident or health insurance as life insurance.—The amount of an accident policy may or may not be payable at death. According to the stipulation filed the accident policy held by the insured provided that the beneficiary would be paid the amount of the policy for 'death resulting only directly, and independently of all other causes, from bodily injuries sustained through external, violent and accidental means, if such death results within ninety days from said accident.' To the extent that this policy provided payment in the event of death by accident it provided for life insurance, but that does not bring it within the term 'life insurance' as it is generally used nor as it is used throughout our statute on insurance."

Cook v. *Continental Casualty Co.*, 160 S. W. 2d 576 (Texas 1942).

III.

Facts Indicating That the Entire Document No. 463892, Including the "Rider" Providing for Additional Benefits in Case of Accidental Death Attached Thereto, Constitutes a Single Life Insurance Policy, So Interwoven That the Whole Constitutes a Single, Integral Insurance Contract and Is Neither "Two Physical Documents" Nor "Two Independent Policies of Insurance."

1. The various pages were securely bound between the covers as one physical instrument.

2. The supplemental contract was the last page, except for the cover.

3. The policy on page one thereof specified "this policy is issued and accepted subject to all the conditions, benefits and privileges described on the subsequent pages hereof, *which are hereby made a part of this contract.*" (Italics ours. T. 4.)

4. The supplemental contract or rider states as a subheading or title: "Supplemental Contract issued in connection with Policy No. 463892, which is the Principal Contract, and of which this Supplemental Contract is a part." Although the policy designates the supplemental contract as being a part of it and the supplemental contract specifies that it is part of the policy, the references to the policy or to the contract are in every instance in the singular and never in the plural. The reference, always in the singular, to "this policy", "the policy", "this contract", or similar designation, occurs not fewer than 55 times. Not once is there a plural designation.

5. The principal contract and the rider contract bore the same date.

6. Only one number was allocated to the entire con-

tract, which included the principal contract and the accidental death rider.

7. The principal contract and the rider were issued in response to a single application, which is stamped with the number 463892, the same serial number as the policy.

8. Question number 4 of the application asks the amount to be insured, the plan of policy desired, and, using the introductory word "with" in the request "mark with X those desired", there follow these items: Disability Income, Waiver of Premium, Double Indemnity, Double Indemnity with Dismemberment. In the application as submitted, a check mark was placed in the box before the items "Waiver of Premium" and "Double Indemnity", thereby requesting that those benefits be included in the policy to be issued in response to the application. (T. 19.)

9. The policy and the application constitute the entire contract. The policy and the application so state. (T. 6, 19.)

10. The supplemental contract has vitality only while the principal contract "is in full force and effect." (T. 23.)

11. The supplemental contract is "subject to all the provisions of said policy."

12. The mode of settlement in the supplemental contract is provided to be "the same as that elected under the principal contract." (T. 23.)

13. The supplemental contract ceases to be in force when any premium provided for in the principal contract "shall not be paid when due or within the grace period provided." (T. 24.) The supplemental contract is neither a contract nor is it intelligible in and of itself. The supplemental contract does not contain the standard provisions

required by the Illinois statutes pertaining either to life insurance or to accidental health insurance.

A. Without such standard provisions, no insurance policy may be legally issued or delivered in Illinois. The standard provisions required for life policies are contained in the main contract.

14. The outside folder which binds the principal contract, application, and supplemental contract, contains a space for registration of change of beneficiary and a space for change in the mode of payment of proceeds under "this policy" on maturity. A change was endorsed in each space. The change in each case contained the language "right of revocation, subject to the terms and conditions of the policy."

A. Each change, although singly made, would be effective to change the beneficiary of the policy including the double indemnity rider, but if they were separate independent contracts each would have to be changed.

15. The original provision for settlement of proceeds was affixed by rider executed by Cecil F. Cross, Secretary of the Company, on page 2, under the title "Provision for Settlement of Proceeds of Policy No. 463892," and applied to the rider as well as the face of the policy. (T. 5.)

16. Provision 1 of the policy states that the policy and the application constitute the entire contract and, in the absence of fraud, the statements in the application shall be deemed representations and not warranties.

A. In a proceeding to cancel or rescind the contract for false representations, such proceeding would relate to both the principal contract and the supplemental contract.

17. Provision 2 of the policy provides for the method and manner of premium payments due under "this policy."

The provision applies equally to premiums for the life portion and the accidental death provision.

18. Provision 3 relates to the grace period for payment of premiums and also applies equally to the principal and the supplemental contract.

19. Provision 4, relating to the incontestability of the policy, states: "This policy is free of conditions as to occupation, residence, travel or military or naval service, except as provided in the total and permanent disability and additional accident insurance provision, if any, and shall be incontestable after two years from date of issue, except for the nonpayment of premiums, provided, however, that the provision for total and permanent disability benefits and additional accident insurance benefits, if any, shall become void or cease to be in force for the causes and under the conditions as stated in the provisions for such benefits." This language clearly contemplates that accidental death benefit provisions are part of the principal contract. (T. 6-7.)

20. Provision 5 states that the beneficiary may be changed by filing a written request therefor; such change "of the policy" shall take effect by endorsement of the "policy." An actual change was made and endorsed on the policy, and although no such endorsement was made on the accidental death benefit provision, the change applied also to it.

21. Under provision 6, a lapse of "this policy" permits reinstatement under a single application for reinstatement of "this policy," not two applications for reinstatement, as would be the case if the principal contract and the supplemental contract were separate contracts.

22. Provision 7 of the policy, relating to assignments, provides that only one assignment is necessary to assign the policy and such assignment includes also the accidental death benefit provision.

23. Provision 8 of the policy provides that no person except an officer may alter, modify or waive the provisions of "this contract."

24. Provision 10 relates to optional settlement provisions, either by the insured or by the beneficiary. At numerous places under provision 10, reference is made to "the proceeds" of the policy. The proceeds are all sums payable under the policy and its supplements, including accidental death benefits. (T. 8-9.)

25. Provision 14, relating to misstatement of age, states that if the age of the insured has been misstated, the amount payable under the policy shall be such as the premium paid would have purchased at the correct age. If the amounts payable under the principal contract were thus reduced by reason of the insured's having misstated his age as a lower age, the amounts payable under the supplemental contract would also be reduced. (T. 13.)

26. Provision 15 relates to the method whereby the plan of insurance may be changed and states that at any time while "this policy is in full force and no premium is in default" and before the insured has attained the age of 60 years, it may be exchanged without medical examination for any other form of policy having a higher premium rate. Provision 15 likewise states: "If a different form of total and permanent disability or additional accident insurance benefits from that provided *in this policy* is requested, evidence of insurability may be required."

27. Provision 13 of the policy under the heading "Guaranteed Values" provides that the cash value will be paid to the insured upon "due surrender of this policy to the Company." Can it be contended that the surrender of "*this policy*" means only the life portion and that the accidental death benefits as represented in the rider will continue?

28. The rider could not exist separately from the policy. It is operative only while the policy "is in full force and effect." (T. 23.)

29. The policy must contain the entire contract; nothing can be incorporated by reference. The rider is incomplete and meaningless by itself. Except by reference to both the rider and the contract, it would be impossible to ascertain (a) the name of the insured; (b) the amount of the insurance; (c) the duration of the accident provisions; (d) the grace period for premium payments; (e) the method of assignment; (f) the period of incontestability; (g) the method of reinstatement; (h) the designation of beneficiary to receive the policy proceeds. The various provisions of the supplemental rider are dependent upon and unintelligible without the policy.

30. The reason for the rider form of accidental death benefits appears from inspection of the application. The application under question 4 asks the plan of policy desired and which, if any, of the following are to be issued with the policy: (a) Disability Income; (b) Waiver of Premium; (c) Double Indemnity; (d) Double Indemnity with Dismemberment. Unless a rider form is used, each plan of insurance would require a lithographed policy, printed without these provisions relating to disability, waiver of premium, double indemnity and dismemberment, and a separate policy printed with each of the fifteen possible combinations thereof. Allowing also for the differences in accidental death and disability requirements of the various States, the number of forms for each plan of insurance would run into the hundreds.

31. The application for insurance is in the nature of an offer from the applicant to the insurance company for a policy of the kind and in the amount described in the application. Custer's application called for a policy of life

insurance with double indemnity in the event of accidental death. The application did not constitute two separate offers, one for a life insurance policy and one for a contract relating to accidental death. Had the Company issued and attempted to deliver a policy without the accidental death features, a contract would not have resulted. The proffer of the life policy alone would have constituted a counter offer for a contract other than the one for which application was made.

IV.

The Criteria for Distinguishing Between Separate Contracts and a Severable Contract.

A. Where the parties assented to all the promises as a single whole so that there would have been no bargain whatever if any promise or set of promises were struck out, then there is a single contract even though it may be severable.

2 Williston, Contracts, Sec. 863.

1. The contract for life insurance could not have been stricken out and the contract for accidental death benefits only delivered, for such contract had validity only while the principal contract was in force. (T. 23.)

2. This Court is aware, of its own knowledge, that no such contract is ever issued by any life insurance company.

3. Only one application (offer) for insurance was submitted to the insurance company, that offer included the request for double indemnity in the event loss of life resulted from accident and the acceptance of the offer consisted of the issuance of the policy in question with the rider attached.

(a) The effect would have been the same had the accidental death provision been printed in the policy instead of attached in rider form.

B. Where the instrument or instruments are executed at the same time, between the same parties and respecting the same subject-matter, they are considered as forming but one contract.

1. Instances of notes and accompanying agreement:

   Davis v. *McVickers*, 11 Ill. 327 (1849) and cases there cited.

   Bradley v. *Marshall*, 54 Ill. 173.

   Continental National Bank & Trust Company of Chicago v. *Ehrhart*, 127 F. 2d 341 (C. C. A. 6—1942) where the court said at p. 343, in speaking of the law of Illinois:

   "Where the other written agreements provide that the note is to be satisfied from a particular source they are to be received in evidence upon the theory that the writings are to be construed as one agreement."

   Nelson v. *Colgrove & Co. State Bank*, 354 Ill. 408 (1933), where the court said at p. 413:

   "The general rule is that, unless a contrary intention is manifested, instruments, executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are regarded as one instrument and will be read and construed together as if they were as much one in form as they are in substance." (Citing cases.)

   See also:

   Heldman v. *Gunnell*, 201 Ill. App. 172 (1916).

2. Instance of contract and lease:

   Crandall v. *Sorg*, 198 Ill. 48, where the court said p. 58:

   "The contract and lease were executed as part of the same transaction, related to the same subject-matter, and, though written at different times,

are to be construed as though they constituted but one writing, this proposition is elementary, and has been too frequently declared by this court to make necessary the citation of authorities."

Maier v. *Continental Oil Co.*, 120 F. 2d 237 (1941, C. C. A. 7), where the court stated through Judge Kerner (p. 240):

"The general rule is that in the absence of anything to indicate a contrary intention, instruments executed at the same time by the same parties, for the same purpose and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together. 12 Am. Jur. p. 782; 17 C. J. S. Contracts, sec. 298, page 716; *Phend* v. *Midwest Engineering, etc.*, *Co.*, 93 Ind. App. 165, 177 N. E. 879, and *Southern Surety Co.* v. *Merchants, etc., Bank*, 203 Ind. 173, 192, 179 N. E. 327."

3. Instances of bonds and trust deeds:

Chicago Title & Trust Co. v. *Robin*, 361 Ill. 261 (1935), where the court states at p. 266:

"The trust deed and bonds constitute a contract between the bondholders themselves, between them as a class and the Robins and the trustee, for they were made at approximately the same time as a part of one transaction. The general rule is that they should be construed together as a single instrument."

See also to the same effect:

Strauss v. *Anderson*, 283 Ill. App. 342 (1935).

Continental National Bank etc. v. *Chicago, etc.*, 283 Ill. App. 64 (1935).

Jefferson etc. v. *Heller*, 296 Ill. App. 447, where the court states at p. 458:

"The authorities are all to the effect that where contemporaneous agreements are entered into pertaining to the same subject matter, they are to be

construed together and this principle applies to notes as well as to any other contract."

4. Instance of shipping order and bill of lading:

   Illinois Match Company v. *C. R. I. & Pac. Ry. Co.*, 250 Ill. 396 (1911), where the court states on p. 400:

   "Where two written instruments are executed as the evidence of one transaction, they will be read and considered together as one instrument in arriving at the intention of the parties. (Citing cases.) Under that rule the shipping order delivered by the plaintiff to the defendant and the bill of lading delivered by defendant to plaintiff constituted the contract between the parties for the carriage of the matches."

5. Instance of purchase order and note:

   Zalapi v. *Holcomb & Hoke Mfg. Co.*, 241 Ill. App. 102, where the court said at p. 106:

   "After plaintiff in error had decided to buy the machine a written order was prepared and signed by the parties, and a note and mortgage were executed. The contract consisted of the order, the specifications, the note and the mortgage. All of these instruments must be read together and construed as one contract."

   Commercial Register Co. v. *Drew*, 168 Ill. App. 347 (1912), in which the court held:

   "The note and the written agreement as to the mode in which it should be payable having been executed together are to be construed as one agreement."

6. Instances where there was more than one part to the contract or more than one execution of the instrument:

   Haggerman v. *Schulte*, 349 Ill. 11 (1932), where the court states on p. 20:

   "The relations of the parties to this litigation

to one another and the property in question must be determined from a consideration of the two written contracts which they entered into at the same time concerning the subject matter of the title to the property, the erection of the building, the financing of the enterprise, the final accounting and settlement of the parties and disposition of the property, and of the attendant circumstances. Although there were in form two independent contracts, they were, in fact, interdependent, having reference to one another, prepared at the same time in the presence of all the parties with reference to the same subject matter in which all the parties were interested, each party knowing the contents of both instruments, and executed if not simultaneously, practically so. They must be read and considered together and constitute one contract as completely as if written as one instrument in the form of a tripartite agreement signed by all of the parties and equally binding on all. The rule is familiar that where different instruments are executed as the evidence of one transaction or agreement they are to be read and construed as constituting but a single instrument. (Citing cases.) Two instruments executed by the same parties, relating to the same subject matter, are to be read and construed as constituting a single transaction. (*Kelsey* v. *Clausen*, 257 Ill. 402.)"

See also:

Lotus Grain & Coal Co. v. *Zimmer*, 217 Ill. App. 591 (1920), where the court said on p. 594:

"No rule of interpretation is more familiar than that when two instruments are executed as the evidence of one transaction, they should be construed as one instrument." (Citing cases.)

Gould v. *Magnolia Metal Co.*, 207 Ill. 172, 175.

McComb v. *Meade*, 256 Ill. App. 128, 138 (1930).

7. Instances relating to policies of insurance.

Julius v. *Metropolitan Life Insurance Co.*, 299 Ill. 343 (1921), at 346-7, where the court said:

"Appellee, by cross-error, contends that the 'face of the policy' means the first page of the policy, and that the rider attached to the second page of the policy attempted to provide a 'mode of settlement at maturity of less value * * * than the amount insured on the face of the policy,' his contention being that the only amount mentioned on the face of the policy is $1000. We do not consider this construction sound. The face of an insurance policy is the entire insurance contract contained in the policy. To construe the term to mean the first page of the policy would compel the insurance companies to print the policy on a sheet of paper large enough to accommodate all the terms and conditions on the front of the sheet. Such a requirement would find no support in reason or in law. Policies issued by most of the well-known insurance companies are delivered to the insured folded in such a way that none of the insurance contract is visible and so that the only visible part of the policy is the endorsement on the outside. The construction for which appellee contends would make this endorsement the 'face of the policy' if 'face' is to be construed that part of the policy which is visible without unfolding or opening the pages. The face of the policy under consideration is all of the matter printed on the first three pages, together with the riders attached and made a part of the policy by reference."

Globe Mutual Life Insurance Association v. *Meyer*, 118 Ill. App. 155 (1905). Of a due bill for a premium and a policy, the court said:

"Having been executed at the same time, (they) are one contract." Citing 2 Joyce on Insurance, Section 1203.

Hoffman v. *Central Surety & Insurance Corporation,* 297 Ill. App. 371 (1938). The court states at p. 374:

"A contract of insurance may, and often does, consist of a policy and other instruments or documents incorporated therein by reference * * *." (Citing authorities.)

Webster v. *Inland Supply Co.,* 287 Ill. App. 567 (1936), where the court states at p. 574:

"Our attention has been directed to the recognized and familiar rule that an insurance contract includes the printed form policy, the declarations therein, and any endorsement thereto, and that the principles governing the interpretation of insurance contracts are those applicable to other contracts, all parts of the insurance contract to be considered together to ascertain the meaning, purpose and intent of the parties * * *."

V.

In Cases Where the Question Has Been Squarely Presented It Has Been Uniformly Been Held That Where a Life Insurance Policy Has Been Issued With a Double Indemnity Rider Attached Granting Additional Benefits in the Event of Accidental Death There Was But a Single Contract of Insurance.

1. Instances respecting the allocation of dividends.

   Rhine v. *New York Life Insurance Company,* 248 App. Div. 120, 289 N. Y. S. 117, aff'd. 273 N. Y. 1, 6 N. E. 2d 74, 108 A. L. R. 1197 (1936). The company adopted the practice of paying dividends at a higher rate upon life policies alone than it did upon those carrying additional benefits whereupon policyholders of the latter class

filed suit to compel the company to apportion its divisible surplus upon the basis that their policies were two separate agreements based on separate premiums. In this way they could share in the full dividend paid on what they contended was the life portion of the policy. In rejecting this contention, the New York Court of Appeals stated (6 N. E. 2d 74, 79):

"It is true that the plaintiff's policy contains two promises which for some purposes and in some contingencies are separable. The promise of life insurance could be obtained without promise of additional disability benefits and for a premium or consideration fixed as the price of the promise of insurance alone; choice rested with the plaintiff whether the policy should include disability benefits for an extra premium, and choice still rests with the plaintiff whether the promise of additional disability benefits should be kept alive by the continued payment of the extra premium. The promise of life insurance would survive even if the promise of the additional benefits, and the extra premium demanded for the inclusion of that promise should be excised from the policy. Though to that extent the promises are separable, they are none the less integral parts of a single policy.

* * * *

Concededly the promise of the disability benefits could be obtained from the company only as a part of a policy of life insurance, and concededly it survives only so long as the policy of life insurance continues in existence. The test of the divisibility of a contract has been stated to be 'whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever if any promise or set of promises were struck out.' Williston on Contracts, sec. 863. Since it is undisputed that the defendant

would not have consented to the bargain for disability benefits unless it was made as part of a policy for life insurance, and since the provision for disability benefits can survive only as part of the policy, it is difficult to understand how the provision for disability benefits can be regarded as an independent agreement made in exchange for an independent consideration."

In its consideration of the points involved in the *Rhine* case the Appellate Division of the New York Supreme Court used the following language (289 N. Y. S. 117, 132, 134):

"We reach the conclusion that the policy is one agreement, a single policy, with both death and disability benefits so interwoven as to constitute a single integral insurance contract * * *.

"In its physical aspect the policy is one instrument. A consideration of the provisions for disability benefits makes it clear that if all of these provisions were taken together apart from the rest of the policy, it would be impossible to spell out a separate contract for disability insurance; there would be * * * no identifiable sum to be paid (for the disability benefits cannot be obtained without the death benefits), and no identifiable person to receive the payment. The provisions for disability benefits are so intimately dependent upon and unintelligible without the death benefits provisions as to be by themselves impossible of constituting a separate contract. There was one application for the policy, not two, and provision is made for one premium. Throughout the policy the singular number is invariably used, never the plural; it is referred to as 'this policy', 'the policy,' 'this Contract', 'the Contract', 'the entire contract'; the policy thus describes itself about seventy-four times in the singular. * * * The Disability benefits * * * cannot be obtained separately, and cannot be continued in force independently of the death benefit in the policy. When

the annual premium became due, if plaintiff tendered the $2.96 specified as the amount for the disability benefits, she could not compel the defendant to continue the disability benefits unless the balance of the premium was paid.

"From all the above it follows that the policy is a single contract containing various provisions and various promises, severable and divisible in one sense as a remedial measure for enforcement, but the policy cannot be taken, as plaintiff contends, as the equivalent of two separate policies, one the exact equivalent of a policy of life insurance with merely a death benefit and the second an independent contract or policy covering disability benefits * * * were the life insurance provision stricken out at the outset there would have been no contract whatever, as disability benefits are issued only when the terms thereof are printed in a life insurance policy; they cannot be separately obtained."

Rubin v. *Metropolitan Life Insurance Company*, 278 N. Y. 625, 16 N. E. 2d 293 (1938). This was a memorandum decision reported as follows:

"From a judgment of the Appellate Division, 251 App. Div. 382, 296 N. Y. S. 908, for defendant holding that under Insurance Law, Consol. Laws, c. 28, § 83 the divisible surplus payable to holders of both ordinary mutual life insurance policies and supplementary contracts for disability benefits should be apportioned according to each holder's contribution thereto, although provision for such benefit was printed on statutory rider form attached to and made a part of policy and not as integral part thereof, such policy with supplementary contract constituting single instrument, plaintiff appeals after his motion for leave to appeal to the Court of Appeals was denied by the Appellate Division, 251 App. Div. 885, 298 N. Y. S. 510. Affirmed."

The Appellate Division of the New York Supreme Court in the Rubin case said (296 N. Y. S. 908, 910):

"The disability 'rider' taken alone, is incomplete and meaningless and, except by reference to the remaining provisions of the policy, fails to disclose most of the essential terms. Moreover, the policy describes itself many times as a single policy. These circumstances, without reference to many others, require the conclusion that the policy, together with the 'Supplementary Contract', constitute a single instrument, both by physical union and in legal effect. Indeed, we find nothing to justify a distinction in the respective rights and liabilities of the defendant and its policyholders under the plaintiff's policy and the policy of insurance under consideration in the *Rhine* case."

Barnett v. *Metropolitan Life Insurance Company*, 258 App. Div. 241, 16 N. Y. S. 2d 198: Aff'd. 285 N. Y. 627, 33 N. E. 2d 554 (1941).

Blackburn v. *Home Life Insurance Co. of New York*, 120 Pac. 2d 31 (Supreme Court of California, in Bank, 1941). The court stated·

"The parties have even more explicitly posited the question for decision, for they agree that if the life insurance policy and the rider for disability benefits issued in connection with it are two separate and distinct contracts, the dividend classification adopted by the insurer is discriminatory; on the other hand, if they constitute but one integral contract of insurance, the policy is distinguishable from those lacking disability features, and the insurer has equitably apportioned its dividends.

* * * * *

Although neither the New York law nor the respondent's charter prohibits it from issuing separate contracts for disability insurance, the uncon-

tradicted evidence is to the effect that no agreements to pay disability benefits have ever been issued by it except in connection with policies of life insurance. Also, such agreements, by their terms, may not continue in force independently of the contracts for death benefits. In accordance with the New York Insurance Law, they have been either 'printed in' as one of the clauses of the life insurance policy, or as a 'rider' or 'supplementary contract' physically and permanently attached to the life policy.

"By a single application, the applicant applied for a policy of life insurance 'with' disability benefit. The insurer issued the policy as applied for, and the provision for disability benefits was contained in a rider form physically affixed to the policy and captioned, 'Contract for Total and Permanent Disability Benefit issued in connection with and attached to Policy No. 330,527 * * * on the life of Howard W. Blackburn.' The policy, including the attached rider, describes itself several times, and always in the singular number as one policy. It is conceded that the agreement for disability benefits has no separate existence apart from the life insurance provisions. Appellant could not, by tendering the premium for the disability benefits, (*sic*) only compel the respondent to separately continue its agreement to pay them unless he simultaneously paid the premium on the life insurance. Also, the rider, standing alone, is incomplete and meaningless. Except by reference to the other provisions of the policy, it is impossible to determine many of the essential terms of the rider, such as the total amount of premium to be waived, the amount of monthly income payable in the event of disability, and the period of grace allowed for premium payment. Both by physical union and in legal effect, the policy and the disability contract constitute a single, unified agreement.

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"The fact that the rider containing the provisions for disability insurance was separately executed does not aid the appellant; this is required by the superintendent of insurance of New York. Nor does the fact that the premium for the disability contract is separately stated and is not combined with the premium for the life policy compel a determination that the insurer made two contracts. True, in the *Rhine* case the policy exacted a total premium for both death and disability benefits, and the court, in holding the disability clause to be a supplementary and not an independent agreement, relied partially on the singleness of the premium, stating that a 'totality of the promises is given for the total premium.' This provision, however, was only one of many which the court considered in construing the policy. Certainly it is not of controlling importance because the regulations of the superintendent of insurance allow an insurer to state separately the premiums for death and disability benefits.

"Nor is the disability rider an independent contract because the benefits provided therein may be discontinued by the policyholder without terminating the death benefit provisions of the policy. As stated in the *Rhine* case, *supra*, because he may do so, 'the disability feature of the policy is indeed severable, but it is severable for the purpose of being terminated, and until the privilege of dropping the disability benefit is exercised * * * the policy with the various promises therein contained is a single policy and may for dividend purposes be dealt with as a whole'."

Sullivan v. *Penn Mutual Life Insurance Co.*, 100 F. 2d 560 (C. C. A. 7) is a case decided in 1938 involving the allocation of surplus between life policies and life policies containing provisions for disability benefits. Defendant's motion to dismiss was allowed by the trial court for the

reason, among others, "that plaintiff's contract is entire and not susceptible of division into two independent agreements * * *." The judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit which cited the *Rhine* and *Rubin* cases to which we have referred.

2. Instances respecting the effect of the incontestability clause contained in the policy.

A. It affects a double indemnity provision attached to a life policy which does no more than grant additional benefits in the case of accidental death because that is held to be a single contract of life insurance.

Federal Life Ins. Co. v. *Zebec*, 82 F. 2d 961 (C. C. A. 7—1936), where Judge Sparks said (p. 963): "The rider is 'attached to and made a part' of the life insurance policy and because it contains no disability benefits, but insures only against accidental death, it is a policy of life insurance, hence governed by the provisions of the Indiana statute as to incontestability and misrepresentation." (citing cases.)

B. It does not affect disability benefits contained in an accident policy indemnifying against accidental death because such a policy is construed to be two policies, one against accidental death which is held to be life insurance and subject to the incontestable clause and one for disability or accident insurance which is not subject to the incontestability clause. *Guardian Life Ins. Co. of America* v. *Barry*, 10 N. E. 2d 614 (Ind. 1937) relied upon in *Miccolis* v. *Mutual Benefit Health & Accident Assn.*, 115 F. 2d 579 (C. C. A. 7—1940).

3. Instance where attorney's fees would be recoverable if provision for double indemnity in case of accidental death is accident or health insurance. *New York Life Ins. Co.* v. *Doerksen*, 64 F. 2d 240 (1933, C. C. A. 10),

where the court said (pp. 242-3): "Decisions of the Supreme Court of Kansas have recognized a clear distinction between policies of life insurance, and policies of health and accident insurance; (cf. *Julius* v. *Metropolitan Life Ins. Co.*, 299 Ill. 343, at 346-7, *supra*) and have classified life insurance contracts with double indemnity provisions as life insurance policies, and not as health and accident insurance policies (Citing cases. Cf. Sec. 18 of Illinois Act relating to life companies, Ill. R. S. 1935 (Ill. Bar. Assn. ed.) Ch. 73, par. 341.) * * *. We conclude therefore that the policy of insurance here sued on was not a policy of health or accident insurance within the meaning of the Kansas statute, and that section 40-256, *supra*, is inapplicable thereto. It follows that the allowance of attorney's fees was erroneous."

4. Instance respecting cancellation of one portion of the contract.

Connecticut General Life Ins. Co. v. *McClellan*, 94 F. 2d 445 (1938, C. C. A. 6), where the court stated (p. 446):

"The policy was a combination policy of life and endowment insurance, with disability benefits. We regard it as a single contract with separable obligations in respect to the different kinds of insurance, one of which might be held invalid or cancelled for fraud without affecting the rights of the parties in the other."

Heselberg v. *Aetna Life Ins. Co.*, 102 F. 2d 23 (1939, C. C. A. 8).

VI.

Even If It Were Admitted That in This Case Two Contracts of Insurance Were Issued, in the Absence of Any Benefits Save Those Provided for Loss of Life, Then Under the Statutes of the State of Illinois and the Decisions of This and Other Courts, Both of Them Were Contracts of Life Insurance and Not Subject to the Provisions of the Accident and Health Act.

Ill. R. S. 1935 (Ill. Bar Assn. ed.) Ch. 73, par. 341, which provides that where a life policy contains a provision granting insurance against death by accident it should nevertheless be deemed a policy of life insurance.

Federal Life Ins. Co. v. *Zebec*, 82 F. 2d 961 (1936), where the Circuit Court of Appeals for the Seventh Circuit held that a rider attached to and made a part of a life insurance policy, if it contained no disability benefits but insured only against accidental death, "is a policy of life insurance." (p. 963.)

Miccolis v. *Mutual Benefit Health & Accident Assn.*, 115 F. 2d 579 (1940), where the Circuit Court of Appeals for the Seventh Circuit held that even in an accident policy containing coverage against both accidental death and disability, that portion relating to accidental death was life insurance. (p. 582.)

New York Life Ins. Co. v. *Doerksen*, 64 F. 2d 240 (1933—C. C. A. 10), holding that a double indemnity provision providing benefits for accidental death is not a policy of health or accident insurance within the meaning of a Kansas statute similar to the Illinois Statute.

VII.

Suggestions.

It is respectfully submitted that the courts below have overlooked the plan of the Illinois statutes pertaining to insurance prior to the adoption of the Insurance Code in 1937. The subject of life insurance is covered by special statutes each of which is separate and distinct from the statutes pertaining to other types of insurance. Every Act of the Illinois legislature touching the subject of life insurance expressly so indicates in its title. Taken as a whole those Acts form a complete scheme for the regulation of life insurance from the organization of life companies, through the method of their operations, down to the very provisions which must and those which may not be included in their policies.

To cull out from a totally foreign statute, to-wit, an Act relating to accident and casualty business, a provision relating to the manner of printing and apply it to a policy of life insurance which deals with nothing but death benefits is simply to introduce confusion into the business of life insurance. Every life insurance policy covers death by accident as well as death from any other cause, but if it is to be decided that every policy covering death by accident is accident insurance, which is the holding of the courts below, then there is no definition of either field of insurance or of the form and provisions of policies.

The amount in controversy is small in this case but the principles involved are very far-reaching. For this reason the petitioner urges that the judgment of the Circuit Court of Appeals be reviewed by this court as provided by law.

Respectfully submitted,

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